LIBRARY
SUPREME COURT, U. S.

No. 154

Office-Supreme Court, U.S.
FILED
JUL 3 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

JESSE GAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 154

JESSE GAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by a jury in the United States District Court for the Northern District of Iowa on two counts. The first charged that he transported 40,000 pounds of meat in interstate commerce, from Mason City, Iowa to Houston and Dallas, Texas, knowing that the meat was stolen (18 U.S.C. 2314); the second, that he had obtained this meat, which was part of an interstate shipment, by fraud and deception (18 U.S.C. 659) (R. 240). Petitioner was sen-

tenced to six months imprisonment on the first count and to two years probation on the second, the sentences to run concurrently (Pet. App. 14). The court of appeals affirmed the first count but reversed the second, holding that the evidence was insufficient to support the verdict that petitioner had obtained the meat in Mason City with an intent to defraud (Pet. App. 19-27).

The undisputed evidence showed that petitioner, a trucker not licensed by the I.C.C., entered into an agreement with a Los Angeles meat broker to deliver 40,000 pounds of meat from a meatpacker in Mason City, Iowa, to a Los Angeles destination (R. 47-48, 50). The Los Angeles broker supplied petitioner with documentation representing that petitioner purchased the meat from the Mason City dealer and resold it to the broker at a slightly higher price. The difference represented what was in fact the transportation charge. These arrangements were made to circumvent I.C.C. regulations, and it was never intended that petitioner be the actual owner of the meat (R. 53-54). On or about January 19, 1965, petitioner picked up the meat from the dealer in Mason City, as planned (R. 122-123), but no delivery was ever made to Los Angeles (R. 102). Instead, petitioner went to Sioux City, Iowa, and sold a substantial portion of the meat there to two buyers (R. 138, 143). From Sioux City, he drove to Texas, where he sold the remainder of the meat in Dallas and Houston (R. 152, 155). Petitioner advised one of the Texas purchasers that he had purchased the meat in Iowa for speculation.

The court of appeals held the evidence insufficient to permit the conclusion beyond a reasonable doubt that petitioner had fixed on his scheme when he obtained the meat in Mason City, rather than later (at Sioux City).[1] It found, however, no reason to reverse petitioner's conviction on count 1. Although petitioner might not be charged with having stolen the meat when he began his trip from Mason City, his sales in Sioux City show that it was stolen meat at that point, before he began his interstate trip. In such circumstances, any variance between the indictment and the evidence was immaterial.

The elements of the crime charged in the first count were interstate transportation of stolen goods, and knowledge by the accused that the goods were stolen. *Loman* v. *United States*, 243 F.2d 327 (C.A. 8); *Johnson* v. *United States*, 207 F.2d 314 (C.A. 5), certiorari denied, 347 U.S. 938. The count did not focus on the acquisition of the meat at Mason City,[2] nor

---

[1] The United States did not seek certiorari to review this decision, but is not to be understood as thereby conceding that it was correct. See Rule 19 of the Rules of this Court.

[2] Count one charged:

> On or about the 19th day of January, 1965, and continuing until on or about the 27th day of January, 1965, in violation of Section 2314, Title 18, United States Code, JESSE GAY did transport from Mason City, Cerro Gordo County, in the Central Division of the Northern District of Iowa, to the cities of Houston and Dallas in the State of Texas, stolen goods, wares, and merchandise, that is, a load of meat consisting of 40,000 pounds of spare ribs having an approximate value of $9,400,000, and Jesse Gay then knew the said meat to have been stolen.

did the government's case depend on proof of fraudulent acquisition to establish the illegal transportation. On the contrary, the government's evidence established the knowing and illegal character of the transportation by wholly independent evidence. It showed that after he left Mason City, but before he began his interstate journey, petitioner sold a substantial portion of it in Sioux City (Pet. App. 17). Petitioner was not the owner of the meat and was not authorized to make this sale. Thus, whatever had occurred in Mason City, he had formed the requisite intent and stolen the meat prior to taking it in interstate commerce from Iowa to Texas.

In this factual setting, the manner in which petitioner acquired the meat was relevant only with respect to the second count of the indictment, and was properly considered by the jury only with regard to that count, in accordance with the court's instruction to consider each count of the indictment separately (R. 236). Similarly, in this setting, whatever the variance between the charge contained in count one and the theory relied upon by the court of appeals to sustain petitioner's conviction under that count, it had to do with an immaterial matter—*i.e.* the point of origin of what the government plainly established was a knowingly unlawful interstate transportation. This type of variance has uniformly been deemed to amount to harmless error. *Lyda* v. *United States*, 279 F.2d 461 (C.A. 5); *Gregori* v. *United States*, 243 F.2d 47 (C.A. 5); *Mellor* v. *United States*, 160 F.2d 757, 765 (C.A. 8), see also *Berger* v. *United States*, 295 U.S. 78. No question of fair notice, as was cen-

tral to this Court's decisions in *Stirone* v. *United States*, 361 U.S. 212 and *Russell* v. *United States*, 369 U.S. 749, is presented.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 354624 767